HON'BLE SRI JUSTICE B.N.RAO NALLA

Crl.R.C. No. 810 of 2006

DATED: 06.2010

Between:

M/s. Thirumala Finance .. Appellant/
Complainant

And

1. S. Anil Kumar Jain
2. The State of A.P.
   and five others .. Respondents

JUDGMENT:-

This Criminal Appeal is directed against the judgment dated 09.04.2002 delivered in C.C. No. 81 of 1998 whereby the learned Judicial Magistrate of First Class, Special Mobile Court, Medak, having considered the evidence both oral and documentary, found the accused not guilty of the offence punishable under Section 138 of Negotiable Instruments Act (for short "the Act"), and accordingly acquitted him.

2. The case of the appellant-complainant in brief is that it is a registered firm carrying on finance business in the name and style of M/s. Tirumala Finance. PW1 is the partner while PW2 is the managing partner thereof. During the months of September and October, 1996, on several occasions, the 1st respondent-accused approached the complainant-firm and obtained loan amount of Rs.2,25,000/- on monthly interest by way of nine cheques drawn on Corporation Bank, Tupran Branch against promissory notes executed by him. However, the accused failed to repay the loan amount. That however, the accused issued a cheque bearing No.162527, dated 24.01.1998 drawn on A.P. Mahesh Cooperative Urban Bank Limited, for a sum of Rs.2,77,250/- in favour of the complainant towards part payment, but the same was dishonoured. A legal notice dated 12.02.1998 was issued to the accused, who sent reply notice with false allegations without complying with the legal notice. Therefore, the complaint

under Section 138 of the Negotiable Instruments Act.

3. During the course of trial, PWs.1 to 3 were examined. PW1 is the partner, PW2 is the managing partner of the appellant-firm whereas PW3 is the Manager of the Corporation Bank besides marking Exs.P1 to P33 on behalf of the complainant. Whereas DWs.1 to 3 were examined and Exs.D1 to D18 were marked on behalf of the 1st respondent-accused. After taking into consideration the evidence brought on record as well as other material, the trial Court came to the conclusion that notice was not issued to the respondent-accused within statutory period, and that no proper authorization was given to PW1 by PW2 for filing the complaint, and that there was no legally enforceable debt due to the appellant-complaint from the respondent-accused. Therefore, the presumption as contemplated under Section 139 of the Act, was not invoked, and as a result, the trial Court was pleased to acquit the respondent-accused for the charge under Sections 138 of N.I. Act.

4. The learned counsel for the appellant-complainant submits that the respondent-accused had issued a cheque dated 24.01.1998 for Rs.2,77,250/- and the same was dishonoured on 29.01.1998 by the Corporation Bank. The legal notice was issued to the respondent-accused on 12.02.1998. Therefore, he contends that the legal notice Ex.P26 was issued to the respondent-accused well within the stipulated period. However, it is to be observed that the endorsement of the bank “account closed” did not contain any date, but Ex.P19 – Debit advice, is dated 29.01.1998 and the same is indicative of the fact that the cheque was returned on 29.01.1998, as such, the stipulated statutory time starts from that day onwards. Therefore, the observation of the trial Court that simply because Ex.P26 is dated 12.02.1998 it does not mean and prove the fact that it was issued within 15 days

appears to be acceptable since the appellant-complainant failed to lead any secondary evidence in this regard.

5. The learned counsel for the appellant further submits that proper authorisation was given by PW2 in favour of PW1 to file the complaint against the respondent-accused, as such, he finds fault with the judgment of the trial Court. However, as per Ex.P1 – partnership deed, PW1 is a sleeping partner, as such, he cannot transact any business including filing the complaint, however, the present case is represented by PW1. Therefore, Ex.P29 -authorisation letter dated 21.03.1998 containing the signature of PW2 is not a proper one since the same has not been signed by other managing partners viz. M.Satyanarayana, K.Lakshman Rao, G.Bhikshapathi and K.Bhaskar who should constitute a committee to transact day to day affairs of the partnership.

6. The learned counsel for the appellant further submits that the respondent-accused owed an amount of Rs.2,77,250/- to the appellant-complainant towards part payment of the loan amount advanced to him, and he had issued the cheque dated 24.01.1998 for the said amount but it was dishonoured. Whereas, it is evident from the evidence of DW1 that the respondent-accused had also raised some other loans in the year 1993 from the appellant-firm and it was at that time he had given two blank cheques and that by filling one blank cheque the appellant foisted a false case against him under Section 138 of the Act. Having regard to the evidence of DW1 and documents exhibited on behalf of the defence i.e. Exs.D1 to D18, the trial Court believed the version of DW1-accused and gave a finding that the complainant failed to prove that the amount of Rs.2,77,250/- covered under Ex.P17 – cheque dated 24.01.1998 was not a legally enforceable debt. The finding of the trial Court in this regard does not

appear to be without any reason and the reasons given by it therefore appear to be tenable.

7. Per contra, the learned counsel for the first respondent submits that the claim of the appellant-complainant is not genuine and to that effect he raised the following points:

i. Whether Ex.P.26 -legal notice dated 12.2.1998 issued by the appellant-complainant was well within the statutory period prescribed under Section 138 of the Negotiable Instruments Act.

ii. Whether the appellant-complainant was properly authorised by M/s.Tirumala Finance to initiate proceedings with the help of Ex.P.29-authorisation?

iii. Whether there is legally enforceable debt under Ex.P.17-cheque due from the respondent-accused to the appellant-complainant.

8. Point No.1:

Ex.P.26- legal notice dated 12.2.1998 is alleged to have been received by the respondent-accused on 16.2.1998. However, Ex.P.18-memo issued by the bank dishonouring the cheque did not mention the date. Ex.P.19- debit advise contains the date as 29.1.1998. That being so, the trial court came to the conclusion that the cheque was returned by the banker of the PW.1 on 29.1.1998. Therefore, it is contended that for all practical purposes, the statutory period under Section 138(B) of the Negotiable Instruments Act starts from that date. It is further contended that the date mentioned on the face of legal notice is not material always and it cannot be concluded that the legal notice was issued on that date. What is important is the date of posting. In this case, the appellant-complainant has not filed any postal record to show that the said legal notice was posted on 12.2.1998. Therefore, it is difficult to conclude that the said legal notice was

issued well within the statutory period of 15 days and a doubt casts as to the sanctity of Ex.P.26- legal notice. It is possible that it is manipulated to save the period of limitation. In the absence of convincing evidence oral or documentary, the trial court had come to the conclusion that Ex.P.26- legal notice was not issued within statutory period.

9. Point No.2:

So far as the authorisation in favour of PW.1 is concerned, it is to be found in Para 4 of Ex.P.1- partnership deed that PW.1 was only a sleeping partner. He was one of the six partners. Out of whom PW.1 is the sleeping partner and five others are working partners and they constitute a committee which shall transact the day-to-day activities of the partnership. Since PW.1 is not one of the working partners, he cannot validly initiate any legal proceedings even in the face of an authorisation. Sleeping partner is disqualified from discharging any functions of an acting partner. Moreover, Ex.P.29, the alleged authorisation letter is issued on the letter head of M/s.Tirumala Finance. It was signed by PW.2 only and not by other four working partners. Therefore, it is a defect which cannot be rectified or ratified. In any case, seen from any angle in the facts and circumstances of the case, Ex.P.29 does not appear to be genuine one. A cloud of doubt is bound to surround around it. Moreover, neither extract of resolution nor its minutes are filed. It also creates doubt. Further a perusal of Exs. D.4(a) to D4(u) receipts discloses that the respondent- accused was contributing and participating in a scheme floated by PW.2 in the name and style of Tirumala Enterprises and that when he demanded his money back, in order to avoid their liability, they got filed a false case against the respondent-accused. The point is answered in favour of respondent-accused.

10. Point No.3:

So far as the existence of legally enforceable debt in this case is concerned, the evidence of PWs 1 and 2 coupled with Exs.P.2 to P.16 loan applications, CD applications and DP notes, supports the case of the appellant-complainant and that the complainant firm issued 9 cheques in favour of the accused and they were encashed by him. That towards repayment thereof he had issued a cheque for Rs.2,77,250/- under Ex.P.17, however, the same was bounced. Therefore, PW.1 filed private case under Section 138 of Negotiable Instruments Act. However, the defence of the accused is that some blank documents including a cheque and a pronote were given in favour of complainant firm in a previous transaction and taking advantage of the same, they got filed a false case against him. Therefore, he is denying having obtained the amount of Rs.2,25,000/- or any other amount from the complainant firm. It is to be seen that out of Exs.P.2 to P.16, some of CD applications the cheque numbers were left blank. It is contended on behalf of the respondent-accused that though the loan applications are dated 15.10.1996, the cheques alleged to have been issued towards loan are dated 14.10.1996. In the ordinary course, the cheques should not have been issued a day prior to the date of loan transaction. Moreover, the cheques alleged to have been issued towards loan amount are all bearer cheques and not account payee ones. In the above circumstances, the alleged transaction does not appear to be genuine one and it appears to be colourable. Hence, the point is answered in favour of respondent-accused.

11. A perusal of Ex.P.32 bank statement discloses that Ex.D.8 dated 26.9.1996 is stated to have been encashed on 24.9.1996 which is not possible.

12. Ex.D.18 is the judgment in O.S.No.31/99 on the file of the Senior Civil Judge, Siddipet filed by the appellant-complainant against the respondent-accused basing on pronote alleged to have been issued by the accused pertaining to the same transaction. However, the said suit was dismissed on 31.12.2001 as the appellant-complainant failed to prove there was any existing and legally enforceable debt due to the appellant-complainant from the respondent-accused.

13. In view of the evidence brought on record, the facts and circumstances of the case, and the points raised by the learned counsel for the respondent-accused, it cannot be said that the trial court has committed any error or irregularity warranting interference from this court.

14. Hence, the Criminal Appeal fails and the same is dismissed.

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B.N.RAO NALLA,J

22.06.2010
Stp/bcj